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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DANIEL ALLEN ESSER,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

Petition for a Writ of Certiorari to the Michigan Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court err in refusing to enter a judgment of acquittal where the court properly suppressed evidence of the victim's identification of the petitioner in a photographic lineup but there were no objective indicia that the victim's in-court identification was independent of that lineup?

II. Did the trial court err in refusing to declare a mistrial or grant petitioner's motion for a new trial where evidence of a photographic lineup identification was improperly placed before the jury through police misconduct?

III. Did the trial court err in refusing to suppress statements attributed to petitioner secured in a pretextual traffic stop effectuated primarily to interrogate petitioner on an unrelated matter?

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OPINIONS BELOW

The March 31, 1995 order of the Michigan Supreme Court was not officially reported. It is reprinted in Appendix A at 1a. The August 26, 1994 order of the Michigan Court of Appeals was not officially reported. It is reprinted in Appendix B at 2a. The June 21, 1994 order of the Thirteenth Judicial Circuit Court was not officially reported. It is reprinted in Appendix C at 3a. The January 4, 1993 opinion of the Eighty-Sixth Judicial District Court was not officially reported. It is reprinted in Appendix D at 4a. The January 5, 1993 opinion of the Eighty-Sixth Judicial District Court on Motion for

Judgment of Acquittal or Mistrial was not officially reported. It is reprinted in Appendix E at 6a. The March 29, 1993 opinion of the Eighty-Sixth Judicial District Court on Motion for Judgment of Acquittal or New Trial was not officially reported. It is reprinted in Appendix F at 21a.

STATEMENT OF GROUNDS UPON WHICH JURISDICTION IS SOUGHT

Petitioner seeks review by this Court under Rule 10.1(c) for the reason that the courts of the State of Michigan have decided certain federal constitutional questions in a manner which conflicts with the applicable decisions of this Court and for the reason that the state court has decided certain unsettled, but important questions of federal constitutional law, which should be decided by this Court. A review on writ of certiorari is sought of the decision of the Michigan Supreme Court denying petitioner's application for leave to appeal which was issued on March 31, 1995.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U S. CONST. Amend. IV

> *Unreasonable searches and seizures.* The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particulary describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. V

> *Criminal actions—provisions concerning—due process of law and just compensation clauses.* No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . .

U.S. CONST. amend. VI

> *Rights of the accused.* In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. XIV

> *Section 1, Citizens of the United States.* . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Mich. Comp. Laws Annot. 750.335(a)

> *Indecent exposure.* Any person who shall knowingly make any open or indecent proposal of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than one year, or by fine of not more than $500, or if such person was at the time of said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be one day and the maximum of which shall be life, provided that any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record.

STATEMENT OF THE CASE

This matter arises out of an incident which occurred on July 30, 1992 in Garfield Township, Grand Traverse County, Michigan. On that date Autumn Rademacher, then 16 years old, went on her "daily run", (Trial transcript, page 19 "T-19"). Rademacher resided on Daisy Lane in the Meadow Lane Village Trailer Park west of U.S. Highway 31 in Garfield Township. (T-18, 19).

Each day she would run approximtaely four miles on a route that took her from her home out of the north end of the trailer park on Lady Slipper Lane onto McCrae Hill Road then to U.S. 31 and back along the same route. (T-20). As she was re-entering the trailer park along Lady Slipper Lane, jogging in a westerly direction near the end of her run, she noticed a small, white car that looked like a Yugo with blue squares on the side and back. (T-21). The car was facing Rademacher and the engine was running. (T-22). As Rademacher jogged by the vehicle, she heard a man in the car say, "Hey, sweetheart" and when she looked she saw that the man had no shirt, his pants were pulled down to his ankles and he was masturbating with both hands over his penis. (T-25, 26). Rademacher then began to run more quickly, cursing to herself as she ran. (T-27). She ran toward a friend's house and, as she did so, noticed that it appeared the car was following her from some distance (T-29). She knocked on the door of the friend's house for about thirty seconds, but no one was there. (T-31). She then ran to her home and told her mother what had happened. (T-34). Rademacher's mother notified the trailer park manager, Nancy Hilliard, who suggested that Rademacher call the police. (T-34). Rademacher's mother called the police about twenty-five minutes after the incident occurred. (T-53).

Deputy Scott Wooters of the Grand Traverse County Sheriff's Department came to Rademacher's home. Rademacher described the perpetrator as a heavy set white male with wire rim glasses and a lot of black curly hair over his stomach and chest. (T-53, 54). She also described the vehicle. Deputy Wooters issued a BOL ("be on the lookout") describing the vehicle and perpetrator which was broadcast to area law enforcement agencies. (T-116).

Later that evening, Deputy Terry Skurnit of the Antrim County Sheriff Department noticed that Daniel Esser's

vehicle appeared similar to the one involved in the incident. (T-117). Esser resides in an adjacent county approximately thirty miles or about a forty-five minute drive from the scene of this incident. Skurnit first surveilled the Esser home, but waited until Esser got into his vehicle before effectuating a traffic stop primarily because Esser's vehicle fit the description broadcast earlier that day by the Grand Traverse County Sheriff Department (T-117). Skurnit photographed the vehicle and sent the picture to the Grand Traverse County Sheriff Department. (T-118). The photograph was shown to Rademacher who indicated that it did not look like the vehicle involved in the indecent exposure incident. (T-55).

In spite of this, Deputy Wooters persisted in his belief that Esser had committed this offense and considered no other suspects. Wooters prepared a photographic lineup consisting of six individuals including Esser to be shown to Rademacher. On August 10, 1992 he took the photographic lineup to Rademacher's home and she identified Esser as the perpetrator. (T-32).

This lineup identification was the predicate for Esser's arrest and the centerpiece of the prosecution's case against Esser. In his opening statement, the assistant prosecuting attorney told the jury:

> You're going to learn that—on August 10th, I believe is the date, that Miss Autumacher (sic)—excuse me, Miss Rademacher went down to the police—well, actually the police went to her house, Deputy Scott—Scott Wooters, and she picked out the petitioner's photograph from six other—he was included in six other photographs, and said, 'that is the man—that's the man who exposed himself to myself,' and you're going to find today that she's going to identify Daniel Esser as the individual who exposed himself to her. (T-16).

Rademacher, the prosecution's first witness, emphasized on direct examination that she identified petitioner in the

photograph lineup. Deputy Wooters was the prosecution's next witness. Deputy Wooters testified that a photographic lineup, which had been marked as a proposed exhibit at that juncture, was the actual lineup shown to Rademacher on August 10 in spite of the fact that at the time he knew this statement was false. Initially, Wooters testified:

> Q. I'm showing you People's proposed Exhibit #1, do you recognize that, sir?
>
> A. Yes, I do.
>
> Q. And how do you recognize that?
>
> A. It's *the photo lineup that I put together and took to Autumn Rademacher's house that day.* (T-64, emphasis supplied).
>
> * * * *
>
> Q. Okay. Now, you took *this array* over to Autumn Rademacher's home?
>
> A. Yes.
>
> Q. And did you show her *this array*?
>
> A. Yes. (T-64, 65, emphasis supplied).
>
> * * * *
>
> Q. How can you be sure that these six pictures are the same ones that you took to her?
>
> A. They're obtained from the same file and they're filed by number and name and after I put the photo lineup together, I listed the name of each person and their jail number and this morning at the Sheriff's Department looked through the jail file and retrieved *the five photographs that I had used that day.* (T-66, emphasis supplied).

At that time, proposed Exhibit #1 was shown by the prosecutor to defense attorney Robert Tubbs. Attorney Tubbs noted a discrepancy between the photographs in people's proposed Exhibit and a copy of the photo lineup provided to petitioner's counsel prior to trial and the photographs marked as a trial exhibit. The jury was excused and petitioner's counsel moved for dismissal or

mistrial. During argument on these motions, Deputy Wooters conceded:

> Those are the photographs that I reecived this morning from the J file that I was preparing for the case. When I looked in the file and found these two photographs next to the earlier or later photographs of these two subjects. *I couldn't remember which ones I had used in the lineup.* (T-69, emphasis supplied).

Deputy Wooters indicated that although he believed the photographs presented at trial were of the same six persons, he learned *the morning before this trial* that the files of certain of these individuals contained more than one photograph and he could not remember which photograph of each individual was shown to Rademacher. (T-79). Wooters confessed:

> I feel that this morning by chance I ended up with different shots of the same people. (T-79).

The differences between the photographs were substantial. For example, one of the individuals in the lineup had a beard in the photograph provided to petitioner's counsel, but no beard in the photograph presented in court. (T-72). In spite of this perjurious testimony by Deputy Wooters describing the lineup which was the predicate of Rademacher's arrest and the victim's identification, the trial court refused to grant a mistrial or dismiss the case. The court ruled that the complaining witness' positive identification *in camera* precludes dismissal based upon an improper lineup. (T-84).

Evidence was presented at trial which established that Esser regularly visited the trailer park in which Rademacher resided, which may have led to her misidentification of him. Esser's brother resided in the park and Esser had been to the park on a number of occasions, both to visit his brother and to pick up mail for his brother who was then working in South America. (T-109).

The trial in this matter took place on January 5, 1993. With the trial court having ruled all evidence of the identification through the photographic lineup inadmissable, the only evidence linking Esser to this crime was Rademacher's in-court identification made more than five months after the incident. Rademacher conceded that she had not seen the perpetrator since she saw him for, at most, five seconds on two different occasions on July 30, 1992.

On June 20, 1994 the Thirteenth Circuit Court for the State of Michigan entertained argument on Esser's appeal of right. The Circuit Court affirmed the ruling of the trial court. In ruling upon Esser's sixth amendment challenges, the court made no comment with regard to the false testimony of the investigating police officer nor did the Circuit Court examine the *Wade* or *Kalchar* [1] factors to determine whether Rademacher's *in camera* identification was independent, repeating the trial court's error. An application for leave to appeal was filed and leave was denied by the Michigan Court of Appeals on August 20, 1994. Petitioner's application for leave to appeal was denied by the Michigan Supreme Court on March 31, 1995.

Esser seeks a writ of certiorari from this Court. Esser seeks to have his conviction overturned and a judgment of acquittal entered. Alternatively, Esser seeks an order vacating his conviction and remanding the case for a new trial.

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[1] *United States v. Wade*, 388 U.S. 218 (1967); *Michigan v. Kalchar*, 400 Mich. 78, 252 N.W.2d 807 (1977).

REASONS FOR GRANTING THE PETITION

I. THE TRIAL COURT ERRED IN REFUSING TO ENTER A JUDGMENT OF ACQUITTAL OR ORDER A NEW TRIAL WHEN FALSE EVIDENCE OF AN EXTRAJUDICIAL IDENTIFICATION WAS INTERJECTED AS A RESULT OF POLICE MISCONDUCT.

On August 14, 1992 petitioner was charged with indecent exposure. It is undisputed that Esser would not have been arrested but for an identification purportedly made by the victim after viewing a photographic lineup on August 10, 1992 at which neither Esser nor his attorneys were present.

Prior to that time, Rademacher had been shown photographs of Esser's vehicle and indicated that she did not believe it was the vehicle driven by the perpetrator. Yet, the police persisted in their belief that Esser was the perpetrator. Rademacher was shown six photographs of persons allegedly similar in description to the perpetrator. These photographs included a picture of Esser. Rademacher identified Esser, indicating that the hair was the same as the perpetrator's and the glasses were the same, but she also indicated the photographic image of Esser appeared thinner than the perpetrator. Plaintiff had previously told Deputy Wooters that the suspect had a lot of dark, curly chest hair. At trial it was established that Esser has virtually no chest hair and has two distinctive tatoos on his right arm, one on the forearm and one on the bicep which were never described by Rademacher as being present on the perpetrator.

Prior to trial, petitioner's counsel requested that the Grand Traverse County Sheriff Department produce reproductions of the photographs used in the array shown to the complaining witness. Petitioner's counsel was advised that reproductions of the photographs would not be made available, but counsel was invited to view those photographs at Deputy Wooters' office. Petitioner's counsel

were shown a photographic lineup that was represented by Deputy Wooters to have been the lineup shown Rademacher. At the request of petitioner's counsel, Deputy Wooters provided a xerographic copy of the six photographs viewed by petitioner's counsel. When a photographic array was marked as an exhibit at the time of trial, petitioner's counsel noted discrepancies between the photographs shown to petitioner's counsel previously and those presented by Deputy Wooters at trial.

Deputy Wooters deliberately failed to advise the prosecutor, court or petitioner's counsel in advance of trial of his inability to reproduce the lineup shown to Rademacher. Instead, Wooters knowingly misrepresented to the court in the presence of the jury that the photographs were the ones shown to Rademacher until inconsistencies between those photographs and the ones previously shown to petitioner's counsel were noted. There can be no doubt that Wooters perjured himself in an effort to mislead the court, the parties and the jury in an attempt to secure a conviction of Esser.

After an extensive discussion outside the presence of the jury, the court ruled that the lineup evidence would be inadmissible, but denied petitioner's counsel's motion for a judgment of acquittal. On appeal, the District Court's exclusionary ruling has never been challenged by the petitioner, nor by the respondent by way of a cross appeal. After recalling the jury, the court gave a cautionary instruction with regard to this evidence.[2] The

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[2] THE COURT: Okay, everybody's here, you may be seated and this is going a little slower than we expected, we had—had some problems and I'll be pointing this out again at the end of trial, but in [sic] turns out that we cannot ascertain today exactly which pictures were shown to Autumn Rademacher by Detective Wooters, from which group he picked out a picture of Mr. Esser, so we determined that the jury is gonna have to completely disregard all testimony, all evidence, having to do with this photographic lineup of pictures. It's—It's, as I say, it's not possible today for us to

court's instruction was inadequate as the jury had already heard both Rademacher and Wooters testify as to her more contemporaneous identification of the petitioner in the photographic lineup.

Under rules promulgated by the Michigan Supreme Court, the trial court had special responsibilities in the conduct of a criminal jury trial:

> The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and *take appropriate steps to ensure that the jurors will not be exposed to information or influences that might effect their ability to render an impartial verdict on the evidence presented in court.* MCR 6.414(A) [emphasis supplied.]

The trial court was unable to fulfill its responsibility as a result of the inability to reproduce the photographic lineup, and more importantly, because of the willful obfuscation of this fact from the court and counsel by Deputy Wooters.

A. Esser's Sixth and Fourteenth Amendment Rights Were Violated by the Trial Court's Refusal to Comply With Important Constitutional Requirements in Considering the Independence of the Victim's *In Camera* Identification at Trial.

The trial court erred in refusing to grant a judgment of acquittal at trial or following petitioner's post-trial motion seeking a judgment of acquittal. The court prop-

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reconstruct exactly what pictures were shown to her, so it's not possible for you to see whether or not it was—a fair and reasonable sampling of other pictures of people of the same rough description, so because it's not possible to do that, the—the effect of that identification is that it should be completely thrown out and we're not gonna use it at all. You're not gonna be seeing any of those pictures and the fact that she did pick out a picture of Mr. Esser has—has no value in the trial from this point forward and it's—you're not gonna be hearing any more evidence at all about that, so with that, are there—do you have any other questions Detective? (T-104-105)

erly suppressed Rademacher's out-of-court identification of the petitioner, but erred in refusing to suppress her *in camera* identification. The court's failure to do so is palpable constitutional error which should be rectified and a judgment of acquittal entered.

The constitutional rights of the accused inherent in witness identification were identified in *United States v. Wade,* 388 U.S. 218 (1967). In that case, this Court noted that all courts must be extremely sensitive to the application and use of witness identification evidence at trial. The Court related, in some detail, the lamentable history of miscarriages of justice wrought on innocent people through the misidentification by eye witnesses. The use of testimony by a victim to elicit identification evidence is peculiarly riddled with enumerable dangers and variable factors which might seriously, or even crucially, derogate from the ability of the accused to receive a fair trial. Once a witness is selected in a lineup, the victim will not go back on her word so, for all practicable purposes, the identification of the perpetrator is made at the pre-trial lineup. Suggestion is usually not the result of police misconduct, but is simply a strong possibility inherent in the process. The police already have a suspect in mind and are eager to have the witness identify that person, as evidenced in this case where, in spite of discrepancies in the physical description of Esser and the victim's inability to identify his vehicle, the police refused to consider any other suspect. According to this Court, the susceptibility to suggestion is greater where the witness's observation of the perpetrator is insubstantial, as it is in this case.

In *Wade,* this Court held that a physical, pre-trial line-up is a critical stage at which the defendant is afforded a right to counsel under the fifth amendment. This ruling was based, in part, upon the confrontation clause of the sixth amendment as well. However, pre-custody photographic lineups do not afford this constitutional protec-

tion. *United States v. Ash*, 413 U.S. 300 (1973). This distinction between photographic and personal lineups was based in large part upon this Court's conclusion that a photographic lineup is not a "critical stage" and is more akin to a part of the mere investigative processes, like witness interviews, than an actual physical confrontation at trial. However, a defendant is also better able to reconstruct this "confrontation" at trial as a substitute for the pretrial confrontation when a photographic lineup is involved. Mr. Justice Stewart noted in a concurring opinion in *Ash*:

> A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant's photograph may be markedly different than those displayed, but this unfairness can be demonstrated at trial from an actual comparison of the photographs used or from the witness's description of the display . . . In short, there are few possibilities for unfair suggestiveness—and those are rather blatant and easily reconstructed. Accordingly, an accused could not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was not present at the photographic display. For this reason, a photographic display cannot be fairly displayed a "critical stage" of the prosecution.

413 U.S. at 324-325.

Because the police were unable to reproduce the photographic lineup and neither Esser nor counsel were present at the time of the photographic lineup, there was literally no opportunity to cross-examine the witnesses on the photographic array, let alone the opportunity for effective cross-examination required by the sixth amendment. Cross examination upon an in-court identification is insufficient to rectify a deprivation of the sixth amendment right to effectively cross-examine the out-of-court identification.

Before permitting evidence of an *in camera* identification to be introduced when an out-of-court identification has been excluded, the court must determine whether the witnesses' *in camera* identification is independent. The burden is upon the prosecution to show that the *in camera* identification is truly "independent" by clear and convincing evidence, or the *in camera* identification must be excluded as well. *Wade, supra,* 218 U.S. at 240; *Michigan v. Kalchar,* 400 Mich. 78, 91, 252 N.W.2d 807 (1977). The trial court cannot merely accept, at face value, the statement of the witness that her in-court identification is independent. *Wade* at 240-241, *Kalchar, supra,* at 92.

In *Wade,* the court identified six factors to be considered in determining the independence of the identification—factors which are neither exclusive nor all-inclusive. In *Kalchar,* the Michigan Supreme Court required consideration of two additional factors [1.) the nature of the alleged defense; and 2.) the physical and psychological state of the victim and any idiosyncratic or special features of the defendant]. Both the trial court and Circuit Court failed to articulate application of the "clear and convincing" evidentiary standard. Both courts also failed to apply *any* of the factors articulated in *Wade* or *Kalchar* and, in disregard of this Court's and the Michigan Supreme Court's mandates, but merely relied upon the complaining witness's self-assurance as to her ability to identify the petitioner.[3]

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[3] In denying petitioner's Motion for Judgment of Acquittal and New Trial, the trial court stated:

> It would seem to me that . . . she would be left with such a strong recollection of the picture—not the man but the picture—that she would walk into a courtroom five or six months later and look at somebody and say, "that's him," and what she would really be doing without knowing it would be—would be saying, "that man looks like the picture I saw" . . . I don't think it to be unreasonable or unrealistic to think that a—a teenage girl jogging by a car, looking to her side and suddenly

The foregoing is an analysis of the *Wade* factors (factors 1 through 6) and the two additional *Kalchar* factors (factors 7 and 8) as applied to this case:

1. ***Prior relationship with or knowledge of the petitioner.***

The complaining witness denied under oath any prior relationship with or knowledge of the petitioner.

2. ***The opportunity to observe the offense.***

This factor includes the length of time of the observation, lighting, noise or other factors affecting sensory perception and proximity to the alleged criminal act. The totality of the witness's alleged observation of the perpetrator consisted of two observations of not more than five seconds, one of which occurred while the victim was running. However, the victim also spent much of this time observing things other than the perpetrator's facial appearance, including his penis, the fact that both hands were wrapped around the penis moving up and down, the vehicle and detailing on the vehicle, the fact that the perpetrator had a lot of dark, curly chest hair and what the vehicle was doing.

3. ***Length of time between the offense and the disputed identification.***

The complaining witness claims to have been able to identify petitioner in court based upon two observations

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there's a man sitting in a car masturbating and looking at her, that she would see the face for a long time, even though she only saw him for a short time then. This is the kind of thing people have nightmares over. I think it could very well leave a strong enough impression that six months later she walked into the courtroom and saw him that she would say, "that is him unquestionably", that that is very plausible . . . All in all . . . it obviously formed a [sic] important piece of evidence in the conviction, and I think that's as it should be under the law. The jury has spoken and I'm gonna allow the verdict to stand and deny the motion for new trial. (M 40-48).

of appreciably less than five seconds, more than five months after the incident occurred.

> 4. ***Accuracies and discrepancies in the pre-lineup or show-up description and the petitioner's actual description.***

The witness was certain that the perpetrator had a lot of dark, curly chest hair, yet Esser has virtually none. So too, the victim noted that the facial appearance of the person she identified in the photograph differed from that of the perpetrator in that the person depicted in the photograph was thinner than the perpetrator in the face. Also, the witness did not identify two distinctive tatoos on Esser's right arm.

> 5. ***Any previous proper identification or failure to identify the petitioner.***

The complaining witness, when shown a picture of Esser's vehicle, indicated that it was not the vehicle she saw the perpetrator drive on the date of the incident.

> 6. ***Any identification prior to line-up or show-up of another person as petitioner.***

The victim did not identify another person as the perpetrator.

> 7. ***The nature of the alleged offense and the physical and psychological state of the victim predicated upon recognition of the fact that in critical situations perception will become distorted and any strong emotion will adversely affect not only perception, but memory.***

The victim, in her written statement to the police provided the day following the incident, indicated at various times that she was "frightened," "scared and horrified," "frantic," "in tears" and was "cursing" to herself. This factor also mandates a consideration of the age and

intelligence of the witness. The complaining witness is reasonably intelligent, but her age must be considered a strong factor against her. She was 16 years of age at the time she made this identification—the age at which an adolescent knows everything. Humility and admissions of ignorance are not strong traits among the average 16-year-old.

8. ***Any idiosyncratic or special features of petitioner.***

The only idiosyncratic feature of the person of the perpetrator described by the complaining witness was the presence of a lot of dark, curly chest hair. It is undisputed that Dan Esser has very little chest hair. Moreover, the witness did not indicate that the perpetrator had any tatoos. Esser has two distinctive tatoos on his right arm.

Under any evidentiary standard, using these factors, it would be impossible for the prosecution to establish that the in-court identification was truly independent. Given the "clear and convincing" evidentiary burden placed upon the prosecution, evidence of the in-court identification, as well as the out-of-court identification, should have been suppressed and a judgment of acquittal entered.

On January 5, 1993, petitioner was convicted of indecent exposure under Mich. Comp. Laws Annot. 750.335(a). In deciding petitioner's post-trial motion for a judgment of an acquittal or new trial, the trial judge ignored the law in this area even after the matter had been briefed and argued and continued to rely on their feeling that the victim was certain of her identification. (Hearing on motion for judgment of acquittal, page 42 "M-42"), in direct conflict with *Wade* and *Kalchar*. Neither the Circuit Court nor the trial court *even considered* the factors outlined in that case, nor did either find that the prosecution had established the independence of the in-court identification by clear and convincing evi-

dence. In fact the trial court's comments suggest that it placed the burden of proof on Esser. (M-42-43). The trial court ignored Esser's fundamental constitutional rights. Reversal and entry of a judgment of acquittal is mandated under the circumstances.

B. Esser's Inability to Conduct Cross-Examination on the Out-of-Court Identification Violates His Sixth Amendment Rights.

Under the sixth amendment, the accused in a criminal proceeding has, among other rights, the right to confront his accusers. The rights of the accused under this confrontation clause fall into two broad categories. First, the accused has a literal right to confront the witnesses against him at trial—the right of "physical confrontation." Second, the accused has the right to an opportunity to effectively cross-examine the witnesses against him and expose to the jury facts from which the jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of those witnesses. *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985). The sixth amendment's confrontation clause is made applicable to the states through the fourteenth amendment. *Ohio v. Roberts*, 448 U.S. 56, 62 (1980); *Pointer v. Texas*, 380 U.S. 400, 403-405 (1965); *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

Denial of the defendant's opportunity to effectively cross-examine a witness is considered a constitutional error of the first magnitude, and no amount of showing of want of prejudice can cure it. *Davis, supra*, 415 U.S. at 318. Constitutional error requiring entering of a judgment of acquittal exists not only where cross examination is wholely denied, but when there is any significant diminution in the ability of defendant's counsel to effectively cross examine the witnesses against the accused as it calls in to question the ultimate integrity of the fact finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The most basic right of a criminal defend-

ant is the right to a fair trial at which the witnesses against the defendant might be meaningfully cross examined. *Wade, supra,* 388 U.S. at 223-224.

Esser was denied an opporunity to meaningfully cross examine Deputy Wooters or Autumn Rademacher on what was perhaps the most important issue in the case—Autumn Rademacher's pre-arrest identification of Daniel Esser near the time of the incident. The only eye witness to this alleged offense and the investigative police officer introduced before the jury compelling testimony upon which they could not be cross-examined. Petitioner's counsel had prepared a significant portion of cross examination of Deputy Wooters based upon the photographic lineup. Instead, after the jury had learned through the testimony of both Deputy Wooters and Rademacher that she identified the petitioner in a pre-arrest photographic lineup, petition's counsel could not cross examine either witness in this regard because petitioner's counsel was neither present at the lineup nor was the lineup able to be produced at the time of trial.

Independent of the issue of whether the introduction of this evidence was unduly prejudicial in light of the victim's alleged *in camera* identification, a judgment of acquittal should be entered. The petitioner's right to meaningful cross examine the prosecution's two most important witnesses on the most important subject matter of their testimony denied him the right to a fair trial.

In *California v. Green*, 399 U.S. 149 (1970) a youth named Porter, who had identified defendant Green as a drug supplier both in interviews with the police and at a preliminary hearing, professed a lapse of memory when called to the stand at Green's trial. When the prosecution offered Porter's testimony at the preliminary hearing, the trial judge ruled the evidence admissible and substantial portions of the preliminary hearing transcript were read to that jury. This Court rejected defendant's confrontation clause attack holding that Green's counsel

had an opportunity to effectively cross-examine Porter at the preliminary hearing. 399 U.S. at 165. However, the court did not address the issue of the admissability of Porter's pre-trial statements to a police officer concerning the same events. *Id.* at 168-169.

Subsequently, in *Fensterer, supra,* this Court concluded that the confrontation clause of the sixth amendment did not prohibit an agent of the Federal Bureau of Investigation from testifiyng that a follicle of hair was removed forcibly even though he could not recall which of three methods he used in making that determination. In *United States v. Owens,* 484 U.S. 554 (1988) this Court determined that the confrontation clause did not bar testimony concerning a prior out-of-court identification by a witness who was unable, because of memory loss, to explain the basis for his identification at the time of trial. In *Fensterer* and *Owens,* the Court emphasized the defendant's ability to effectively cross-examine as to the infirmities in the witness's respective testimony in concluding that the constitutional requirement of an opportunity for effective cross examination was satisfied. In *Owens,* the Court stated:

> The weapons available to impune the witness's statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons, as is demonstrated by petitioner's counsel's summation in this very case, which emphasized Foster's memory loss and argued that his identification of the respondent was the result of the suggestions of people who visited him in the hospital.

Owens, 484 U.S. at 560.

In this case, unlike *Owens* and *Fensterer,* the "evidence" could not be scrutinized by the jury. In both of those cases, the defendant had the opportunity to cross-examine a witness as the infirmities in his testimony, giv-

ing the jury an opportunity to place little or no weight on that testimony. In this case, the constitutional error is more severe because it involves "non-evidence" or evidence that was offered to the jury of the out-of-court identification which was subsequently excluded. While the court gave a cautionary instruction which was well intended, it was inadequate given the testimony the jury already heard. Petitioner's counsel could not unring the bell. More importantly, the *only* reason the jury was exposed to this prejudicial non-evidence was the perjury of the investigating officer who deliberately attempted to mislead counsel, the court and the jury. Had Deputy Wooters been candid with the prosecutor or the court, Rademacher's testimony never would have been presented to the jury.

At a minimum, petitioner's denial of the right to effectively cross-examine Rademacher and Deputy Wooters requires a new trial at which this evidence will be suppressed and the jury will not be "tainted" by testimony regarding a pre-arrest identification. However, given the serious and grievous nature of this constitutional error, the serious misconduct on the part of Deputy Wooters and the inability to reproduce the lineup at a new trial at which Deputy Wooters and the victim could be cross-examined on the nature of the lineup, a judgment of acquittal is warranted.

II. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE OBTAINED THROUGH A PRETEXTUAL TRAFFIC STOP EFFECTUATED PRIMARILY TO INTERROGATE THE PETITIONER ON AN UNRELATED MATTER IN A CUSTODIAL SETTING.

On August 30, 1992, Esser was subjected to a traffic stop effectuated by Deputy Terry Skurnit of the Antrim County Sheriff Department. At approximately 8:35 p.m. Skurnit drove by the Esser residence in Rapid City and noted similarities between the Esser vehicle and the ve-

hicle described in the BOL ("be on the lookout") broadcast earlier that day. Rather than approaching the residence to seek to question Esser directly, Skurnit surveilled the Esser home, waited in the area and, after Esser left the residence in his vehicle, effectuated a traffic stop at which he questioned Esser concerning this incident and photographed the vehicle.

Skurnit testified to the obvious at trial—that the primary purpose for stopping the Esser vehicle was to question him about the incident which occurred in Grand Traverse County earlier that afternoon. No traffic citation was issued to Esser. Skurnit merely questioned him about the Grand Traverse County incident and photographed his vehicle without advising Esser of certain of his constitutional rights as required under *Miranda v. Arizona*, 384 U.S. 436 (1966).

Upon receiving a complete copy of the Antrim County Sheriff Department report prepared by Skurnit, petitioner promptly requested a *Walker* hearing.[4] The hearing was held on January 4, 1993. The trial court ruled that statements made by the petitioner during this interrogation were admissible.

The test for determining whether evidence obtained through an interrogation undertaken without first informing the individual of his constitutional rights as admissible is whether the defendant was in custody at the time of the interrogation. E.g., *Beckwith v. United States*, 425 U.S. 341 (1976); *Michigan v. Hill*, 429 Mich. 382 415 N.W. 2d 193 (1987). Arrest is not dispositive for determining whether one is in custody. Rather, the test for determining custody is whether a person is deprived of his freedom in a meaningful way under the totality of

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[4] A *Walker* hearing is a hearing authorized under *Michigan v. Walker* (on remand), 374 Mich. 331, 132 N.W.2d 87 (1965) in which the defendant may make a constitutional challenge as to the admissibility of certain forms of evidence prior to trial in a criminal proceeding.

the circumstances with the key question being whether the defendant reasonably believes that he was not free to leave. *Miranda, supra*, 384 U.S. at 444.

The stopping of an automobile and detention of its occupant constitutes a "seizure" within the meaning of the fourth amendment even if the purpose for the stop is limited and the resulting detention is quite brief. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). However, in addressing the interrelationship between routine traffic stops and the requirements of *Miranda*, this Court has carved out a narrow exception to *Miranda* for questions posed ancillary to a routine traffic stop. *Berkemer v. McCarty*, 468 U.S. 420 (1984). This Court has rejected the argument that traffic stops are inherently noncustodial, agreeing that traffic stops are essentially custodial in nature. *Id.* In Michigan the law requires a motorist to stop and remain for a reasonable time when directed to do so by a law enforcement officer. Mich. Comp. Laws Annot. 257.602; 257.602(a) (failure to stop at the direction of a police officer is a misdemeanor).

However, probable cause is still required for the traffic stop in order for it to be valid. *Brinegar v. United States*, 338 U.S. 160 (1949). A stop and inquiry of an individual must be reasonably related in scope to the justification of its initiation in order for it to avoid triggering the requirements of *Miranda*. E.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); see also *Terry v. Ohio*, 392 U.S. 1 (1968). A fact-based test is used to determine whether an individual is in "custody" when questioned pursuant to a routine traffic stop. 468 U.S. at 441.

The trial court extended the exception articulated in *Berkemer* beyond the boundaries of the fourth amendment. Skurnit admitted that the traffic stop was a mere pretext for questioning Esser about the Grand Traverse County incident. He could have questioned Esser at his

home, but waited to effectuate the traffic stop for the very purpose of enabling him to interrogate Esser in a more custodial setting. In *Berkemer*, this Court rejected petitioner's argument that suspect need not be advised of his rights until he is formally placed under arrest following a traffic stop stating that this, ". . . would enable the police to circumvent the constraints on custodial interrogation established by *Miranda*." *Id.* at 441. Yet, the trial court's decision in this case gives law enforcement officials the ability to circumvent *Miranda* with impunity.

The trial court erred in determining that evidence obtained in the pretextual traffic stop was admissible against Esser at trial. The trial court's decision in this regard should be reversed and the matter remanded for a new trial.

CONCLUSION

For all of the foregoing reasons, petitioner Daniel Allen Esser respectfully requests that this Court grant his petition for a writ of certiorari, reverse his conviction and enter a judgment of acquittal. Alternatively, Esser requests that this Court remand the matter for a new trial.

Respectfully submitted,

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Dated: June 29, 1995

* Counsel of Record

APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

100800

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DANIEL ALLEN ESSER,
Defendant-Appellant.

SC: 100800
COA: 176770
LC: 93-006291-AR
DD: 92-4984-SM

ORDER

Entered: March 31, 1995

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX B

COURT OF APPEALS
STATE OF MICHIGAN

Docket # 176770

L.C. # 93 006291

PEOPLE OF MI

v

DANIEL ALLEN ESSER

Harold Hood, Presiding Judge; Myron H. Wahls, Michael J. Connor, Judges.

ORDER

The Court orders that the motion for immediate consideration is GRANTED.

The application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion for bond is DENIED.

Date Aug. 26, 1994

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GRAND TRAVERSE
13TH JUDICIAL COURT

Circuit Court No. 93-6291-AR
District Court No. 92-4984-SM

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
DANIEL ALLEN ESSER,
Defendant-Appellant.

ORDER

At a session of said Court held in the City of Traverse City, County of Grand Traverse, on the 20th day of June, 1994

PRESENT: HONORABLE THOMAS G. POWER, Circuit Judge

The Court having reviewed Defendant-Appellant's Brief on Appeal and Plaintiff-Appellee's Answer in opposition, and further having heard argument from both parties, denies Defendant-Appellant's Appeal for the reasons set forth on the record and upholds the 86th District Court decisions. The Court grants Defendant-Appellant's request for a continuing bond for a period of no longer than fourteen (14) days from the date of the above hearing.

/s/ Thomas G. Power
THOMAS G. POWER, P24270
Circuit Court Judge

Executed: 6/21/94

APPENDIX D

STATE OF MICHIGAN
IN THE 86TH DISTRICT COURT
FOR THE COUNTY OF GRAND TRAVERSE

Case No. 92-4984 SM

PEOPLE OF THE STATE OF MICHIGAN,

v.

DANIEL ALLEN ESSER,
Defendant.

MOTION TO DISQUALIFY JURY PANEL
AND MOTION TO SUPPRESS

BEFORE THE HONORABLE JAMES R. MCCORMICK,
District Judge

Traverse City, Michigan—Monday, January 4, 1993

* * * *

THE COURT: Okay, thank you. I'm denying the motion, I—I think there is—it's an arguable proposition that defense makes and—but this court doesn't make up the rules on this subject, I'm confident that it is the thrust of Michigan case law from the higher courts that where the individual has not been told he's under arrest, has not been physically apprehended, has not been handcuffed, has not been told to take a seat in the back seat of the patrol car, that he is not deemed to be in custody for pur-

poses of the Miranda warnings. I agree with the defense that you can make an argument that a man in this circumstance would not feel free to say "Officer, I'm sorry, but I'm in a hurry, I'll catch you later." Needless to say, if you've been stopped by a police officer on a traffic stop and are being questioned, whether you're being questioned about your driving or you're being questioned about a murder that happened last week, you would not normally feel free to—to excuse yourself and start the car and drive off, so—and that is what the appellate courts have dealt with in saying that—that a brief traffic stop does not constitute custody for purposes of Miranda, that—even though you're not really free to leave, you're not in that type of a (sic) intimidating coercive environment where you would—where you might be expected to admit something against your will.

I guess I—I don't think—here where you're still out on the street, you know, you can still see the blue sky, breathing free air, that it is the viewpoint of the higher courts that the atmosphere surrounding the questioning is so intimidating, is so police-controlled, that a citizen might make an admission of guilt or admission against interest even though it wasn't so. This is nothing like the cases that led to the Miranda decision, classically there you're talking about somebody that is locked up, is being grilled, is in a totally intimidating environment with no friends, no advocates on his side and a very clever detective using all the powers of psychology to—to get him to say something he doesn't want to say. That's the other extreme, of course, but I—I think this case does not—it does not involve the kind of coercive atmosphere that as a matter of policy the appellate courts have chosen, to say triggers the necessity of Miranda, so I'm denying the motion.

* * * *

APPENDIX E

STATE OF MICHIGAN
IN THE 86TH DISTRICT COURT
FOR THE COUNTY OF GRAND TRAVERSE

Case No. 92-4984 SM

PEOPLE OF THE STATE OF MICHIGAN,

v

DANIEL ALLEN ESSER,
Defendant.

JURY TRIAL

BEFORE THE HONORABLE JAMES R. MCCORMICK,
District Judge

Traverse City, Michigan—Tuesday, January 5, 1993

* * * *

THE COURT: Well, okay, let's think about the—the consequences of different ways to deal with—I'm not going to dismiss the case, I don't believe that—that—my recollection of the case law, if the—if the witness makes a positive identification in court and maintains that that is based upon a clear recollection of the appearance of the defendant at the time of the crime, apart from any lineup or show up that might've occurred, then dismissal based upon an improper lineup is not appropriate. The question is what—what is the right remedy, and one way to deal with this, I guess, is for

me simply to abort any further questions regarding this subject, instruct the jury that it has been determined by our investigation while they were in the jury room that it's not clear which other pictures of other men were shown along with the picture of Daniel Esser at the time of the photographic lineup, and we determined that the—that lineup was not a valid comparison of his appearance with the appearance of other individuals, and that the jury should disregard any testimony concerning her having—having picked his picture out from the others; that's one way to approach it, and the question is does that do more harm than good?

Another possibility, and it would have to be within the option of the defense counsel, would be to have the Detective obtain from the—their files all other mug shots that they have on file of these individuals, and just lay it all out to the jury, in other words, bring it out for the jury's benefit, that in addition that it's possible that other than the pictures that are put together in this group of six, that—that any of these other mug shots of the same people might have been the ones shown and that it's impossible at this time to—to determine which mug shots were shown and let them look at all of them and make it—make of that what they will; whether that strengthens the prosecution or benefits the defense is—I don't know, but that's one possibility if the defense wanted to do it.

MR. TUBBS: Yeah, certainly I can't make that decision, I haven't seen the photographs as to, you know, I don't know, I think the fact of the matter is that the photographic lineup is tainted and we can't undo that taint, I think we just—we simply don't know, and I, you know, I don't think it's a matter it's not clear which ones, I think we just don't know at this point which photographs were used, and I think Detective Wooters has been honest in that regard that he doesn't know which ones he would've used at the time that he showed her.

whether those were the same that he showed me, or whether they're the same as here, or whether there's some other photographs that may exist in the files.

THE COURT: So the effect of it is that it's not necessarily true that the—that the process used on the day in question was tainted, but that—that it's now impossible to—to show the jury six pictures and say these are the six pictures that were shown to Autumn Rademacher, and you decide whether you not—whether you think that was a fair grouping, and that's—it's impossible to do that. Now, the Prosecutor has argued, based upon his assessment of case law, that—that there's no obligation on the part of the state to preserve evidence of this type—

MR. PAPPAS: Well, we—

THE COURT: —I presume absent a request.

MR. PAPPAS: —we should—

MR. TUBBS: You'd think if they were gonna use—

MR. PAPPAS: —your Honor, but case law has indicated that if by chance we have a mistake, as we have a mistake now, that dismissal of the entire case is not the appropriate remedy. The Court can fashion a remedy such as suppressing this portion of the testimony completely, okay, or the alternative, as the Court has given the defense counsel the object—I mean the choice, but dismissal of the case is not proper.

MR. TUBBS: But I'll—but I'll never know, I mean, the Defendant in this case will never know what she saw, and we'll never know whether or not that may have influenced her identification of Mr. Esser in the courtroom today; we will never know that, and that's not our responsibility, that's not, you know, I'm not saying anybody is to blame, but somebody's responsible and it wasn't us—

THE COURT: Sure, I think the—I think the courts have spoken on that point and have said that, I agree with the Prosecutor, that if—if she—now, if she were to say essentially, condition her testimony today by acknowledging that she can't remember exactly what he

looked like on the day in question, but she does remember that this man in court is—is one of the pictures that she saw, or one of the men that was in a lineup.

MR. TUBBS: But I certainly may have had a cross-examination, some cross-examination, for her if I knew at what she looked at, and there was—there was some real credibility problems. I may have had a cross-examination of her that may have said "Well, no, you know, the photographic lineup was pretty clear of Mr. Esser and yeah, maybe I do recognize him from the photographs," but I don't know what she saw.

THE COURT: Best you could do would be to show —you could say "Look, as to individual, subject number one, we don't know whether she saw this picture or this picture or this picture, as to subject number four, we don't know whether she saw this—well, except—not four, he's four, number three, we don't know whether she saw this or this or this,"—

MR. TUBBS: You know—

THE COURT: —which would muddy up the waters at most, but that's all from what defense wants to do.

MR. TUBBS: Yeah, I think—I think it would muddy up the waters, I think it—

THE COURT: Well, my experience, if defense is benefited by—usually by muddying up the waters in this type of circumstance, but in other words, it's the prosecution's contention that they have—they had a good photographic lineup and that picture number four was picked out by her by question and cross-examination could show that yes, picture four was picked out but we don't know what all other pictures were shown; we know that these other five individuals' pictures were shown, but we don't know that it was this or this or this version, we don't know whether it was the one in which he had a moustache or didn't, the one whether he had his glasses on or didn't, had a beard or didn't, had short hair or long hair, all of which would tend to discredit the—the show of. Alternatively, as I said, I'm willing to simply instruct the jury that—that there has—that we don't—that we don't know

which of the number of pictures of the same people were shown and as a result the—it's been determined that the —that the—the effort to have Defendant picked out by Autumn Rademacher from the pictures was—was defective and should be totally ignored. I would think that would be the best outcome, but I want to give you the alternative.

MR. TUBBS: Your Honor, I guess if you're presenting, you know, a couple of scenarios to defense counsel as to what possibly could be done, making it clear on the record, I'm not waiving my right to any appeal on the basis that this case is not dismissed at this point, and then I'd go to the next step and I have this option. You know, looking at it at this point, being confronted with this, at this point I would suggest that I—I think it would be best to instruct the jury that any testimony with respect to any photographic lineup that was presented to Autumn Rademacher is to be disregarded for the reason that it can no longer be determined what photographs were shown to Autumn Rademacher at the time she was given the photographic lineup, and I certainly don't want to be precluded from arguing in my closing that the defense is prejudiced by that.

MR. PAPPAS: Well, your Honor, I—I think that that's going a little bit too far, the Court can give an instruction that—to the jury that they are to disregard any testimony about identification by photo lineup, okay, and then in—but not—but not to allow defense counsel to then say "Well, we've been prejudiced because the prosecution has screwed up," okay, because the—because the testimony is clear that number four is the same photograph of the Defendant and that was picked out, okay, so I—

THE COURT: Well, I—I don't know, I mean, I—as long as I'm not telling the jury that—that the Defendant's been prejudiced or—or throwing the case out for that reason, I'm kind of reluctant to tell the defense counsel what he can and cannot argue to the jury. If he wants

to argue to the jury that they—the prosecution screwed up in this photographic lineup and the—it may have hurt my client because it may be that—that the group of pictures that were shown were not representative or not—not similar and we'll never know exactly, and—and we think that that may have led to her identifying him today. I mean, I—I don't think that he can be prevented from—from arguing that the photographic lineup was—was botched and—and the—the results were suggestive of—had you—he was prepared, obviously, to come in here today and argue that this group of—of pictures that were shown to her included five people that were unlike him and that at best two of them had glasses, and she clearly remembered him as wearing glasses, she remembered him as being overweight, a heavy man, and some of those pictures don't look like heavy men at all, at least not in the face, I mean, I—he was prepared to argue that the—that the—that the photographic lineup was suggestive of him, that there weren't comparables, and now because they're not gonna—we're not gonna do that, as a result he's—I just—I guess I'm kinda reluctant in terms of avoiding committing further error here to say that the defense counsel can't argue that the photographic lineup in this case was unfair or damaging, even though he can't get into the specifics because the jury isn't gonna have any specifics.

MR. PAPPAS: Well, see, that's the problem, your Honor. If—I could see that argument if—if defense had chosen the alternative that the Court provided, let's have all the pictures that possibly could have been involved, and let—and then he can argue to the jury "Look, based upon all these pictures, we don't know which ones were shown," okay, "look," you know, "here's a guy with glasses, here's a guy," you know, "the same guy without glasses, here's a guy with—clean-shaven, here he is with a beard, and we don't know which one was shown." Then he could argue that, but for—but for the Court to say to the jury "Disregard the testimony," okay, they're

supposed to disregard the testimony and just ignore it, but then to allow defense counsel to then get a—to get a bite at the apple by saying "Hey, and disregard it because the prosecution," you know, "screwed up the lineup and that prejudiced my Defendant, because now we don't know—we don't know what those other pictures were like," so that's why my argument is if the Court is inclined to give the instruction disregard it—the testimony—then the testimony is suppressed and I and defense counsel should make no mention whatsoever of the photo lineup whatsoever, or any inferences from that. If defense decides to yes, your Honor—yes, your Honor, we'd like to take the option of having all of the pictures, then he has free reign to argue "And it could have been this picture that was shown to Autumn Rademacher, and this picture does not have any glasses, while the picture of Mr. Eiser (sic) does have glasses, so that would be unduly suggestive." I could see that happening, but not if the Court is going to instruct the jury to disregard the testimony.

THE COURT: Okay, okay, you make a—

MR. TUBBS: I—I—see—and again, I'm at this point, I don't want to belabor this Court—with the Court, but I think, you know, I'm at the point where it's just not fair to the Defendant anymore, there's no fair way for the Defendant in this case because of what happened. I think, you know, I was prepared to argue she was—you know, and I think could make reasonable inferences to the jury and make an argument that she could have seen Mr. Esser in the park before, although she didn't specifically remember him, she could have seen him although couldn't recall—consciously recall. When shown a photograph with five other photographs that I don't know what they were, that that may have led her to look at Mr. Esser, and between the two, I think I can make that argument to the jury although she pointed him out, that she was led to believe who the Defendant was and was able to identify him, obviously she'd seen his picture

before, so it was easy for her to make an identification of Mr. Esser if she hadn't seen pictures of anybody else before, and so I think I—I want to obviously make that argument to the jury in my closing, and as far as bringing other photographs in, I mean, we're presenting photographs that we—there is no testimony as to whether those are the photographs that she saw, and I don't think we can show those to the jury. We don't—we don't know, there's no foundation as to whether she saw any particular photograph, and—and without being able to lay the foundation, I don't think we can show it to the jury.

THE COURT: Well, you've already chosen which of the two ideas I gave you you want to follow, I guess Mr. Pappas has persuaded me that if the jury's gonna be instructed to completely disregard the—the photo lineup and any identification made from the photo lineup on the basis that the—it's impossible now to determine exactly what group of people were shown to her, then on the one hand the Prosecutor is barred from—from arguing that she correctly picked Daniel Esser's picture out from that lineup, it seems that would be—

MR. TUBBS: Sure, he doesn't need to do that, I mean—

THE COURT: —seems to me that the converse is that—that the defense can hardly argue because it's not —there's nothing in this record from which you could argue that the—the particular composition of subjects who were used in the—in the photo lineup was an unfair group of snapshots.

MR. TUBBS: There—there was testimony from her that she saw a photographic lineup, and that she picked Mr. Esser out of a photographic lineup, and I think we've got—and I may be mistaken, we'd have to go back in the record, but I think we got from Detective Wooters that she pointed out number four, so there's been testimony from two witnesses that she picked him out, and—and so I think it's clear that she saw a photograph of

Mr. Esser. At this point, you know, I think I'm entitled to argue that she saw a photograph of Mr. Esser, that it obviously makes it easier for her to make an identification in court having seen a picture of Mr. Esser before, but we don't—but we don't know, the defense doesn't know, who else she saw. We don't—we don't know what the people looked like in the pictures that she saw.

THE COURT: Okay, you're not in a position to argue that the particular group of pictures was an unfair group, because—because—

MR. TUBBS: I don't know if it was or wasn't.

THE COURT: —well, no, but you—at—as things stand, the—the jury is not gonna be shown the pictures, they're gonna be instructed to completely disregard the—the photo lineup and disregard the ID made from the photo lineup, so you would not—could not—logically argue to the jury, because there's no record from which you could argue to the jury, that the other five snapshots were sufficiently unlike him, or—nor can the Prosecutor argue that they were sufficiently like him, because—because we're—we're rejecting as an exhibit all this material. I—I guess I'm more inclined to—to agree, and I'd like to hear Mr. Pappas' response on that, if he has one, but that perhaps it is appropriate to allow the defense in closing argument to argue that one point from the photo lineup, namely, that she saw him one time on the—she claims she saw him one time on the street and she saw his—she saw his picture, his picture was shown to her along with some others and he picked that out—she did pick that out, and now she sees this man here today whose picture was shown to her. She now says "Yes, that's the man who exposed himself to me." Isn't it possible that having seen this man's picture is suggestive? I mean, I—if that's what you want to argue—

MR. PAPPAS: That'd be fine with the prosecution.

THE COURT: Pardon?

MR. PAPPAS: To that line, your Honor, that would be fine with the prosecution, that he could say that her in-court identification now, even though we have testimony from her that it's independent of the photograph, I—given the circumstances of what we're in, I—I mean, I would go that far, but not the other part that Mr. Tubbs wanted. I mean, that could be a logical inference that he could argue.

MR. TUBBS: I just—I—I—I really have a problem, your Honor, I just—my sense of fairness is—has been violated, I think, and I just still do not see how it's fair that—that one thing can lead to another. Her identification in the photographic lineup can in fact lead to her identification of Mr. Esser here, and we'd have no ability to go back to look at whether or not when she originally saw Mr. Esser that—that she was directed to him by whatever the photographic lineup may have been and by some of the things that I was going to point out with the lineup that I thought she saw. We can't undo that, and we cannot undo and I cannot cross-examine her—

THE COURT: Well, I—I'm comfortable—okay, I'm comfortable with my ruling on that point, so I'm not gonna reconsider it. I—I—I'm going to authorize, and I now—I believe that the prosecution does not object to that, that even though the—I'm instructing the jury—I will be instructing the jury—that the photographic lineup is to be disregarded as any proof in the matter and that any ID made from the—of this man from the photographic lineup should be completely disregarded on the basis that we—we—we cannot put together the group of pictures today so they could be evaluated or shown to the jury or critiqued, but the—the—the defense can still make the closing—in closing argument the contention that the fact that he was shown a picture of Daniel Esser may very well have played a factor in her ability today to say "I recognize this man as the man who was out on the street," so to that extent, I think that despite the fact

that the photo lineup is being rejected as evidence and the jury is gonna be so instructed, that defense can still—has to be allowed to make that argument.

MR. TUBBS: The Court—the Court asked defense counsel what preference would be of those two options, and I think my initial preference was option B, if you want to call it that, and with the assumption, I think, that I, you know, assumed I would argue this, and now the Court is telling me that my argument in that regard would be limited. I don't really know what my best decision should be for my client at this point.

THE COURT: Well, what—what further argument—what further argument could you—

MR. TUBBS: Well, no, I—I just wanna—what I'm asking—what I'm thinking to myself in light of—of the Court would be doing that if I chose option B to exclude—to exclude any testimony in that regard, that I would be limited to say that she may have been tainted by a photograph that she saw.

THE COURT: What else could you say?

MR. TUBBS: Well, I guess what I'm wondering at this point is now should I look at those other photographs and say well maybe my option A is the better option for me in light of what the Court is telling me that I will not be able to argue under option B, and I'm not trying to—I'm not trying to get both ways, but I just—I've been confronted with a situation that I didn't expect to be in, and I'm just trying to make the best decision for my client.

THE COURT: Well, okay, so am I. Under option B, that is that I'm gonna tell them to disregard the photo lineup, what other argument could you, in this state of the record, make to the jury from the photo lineup other than the one we've been talking about?

MR. TUBBS: I think the Court has told me that I could not argue—

THE COURT: Well, what—what other one is there, what other possible argument could there be?

MR. TUBBS: Well, I think to argue that the defense counsel has no way of knowing what those photographs were shown, what they are, we don't know what they are, and all we know is that she picked out a photograph amongst photographs that we do not know which existed, so we don't know what she saw and what she didn't see, but we know that she saw—

THE COURT: Well, I will—I will have—I will have instructed them that essentially for that fact.

MR. TUBBS: Then if I could argue that in my closing, I think that basically the extent of my closing would be to say "We don't know what she saw and what she didn't see, all we know is that she picked out a photograph, there was testimony that she picked out a photograph of Dan Esser, and that may have led her or made it easier for her to make an identification of Mr. Esser in court today, but that the defense counsel does not have an opportunity to look at what other photographs that she saw at that time, we don't know."

MR. PAPPAS: Your Honor, I would object to—to that, because then you would have the jury speculate endlessly, it could have been five black men plus Daniel Esser whose pictures were shown, it could have been five dwarfs, it could have been anything—

MR. TUBBS: It could have been, for all I know, your Honor, I mean—

MR. PAPPAS: Well, we've had testimony—that's not true—

THE COURT: Well, no, that's not true, we—we have the sworn testimony of the Detective, unless you want to question that, that—that it was these five individuals but—but some of them had more than one mug shot on file, that's all, so there's—it would be a minor difference in the—to the extent that you take three pictures of the same person a year apart, they're gonna look

a little different depending upon how they wore their hair and so forth.

MR. PAPPAS: So I think the—the—

MR. TUBBS: Or whether they're fatter or thinner.

MR. PAPPAS:—the Court's allowing defense counsel to argue to the jury that—that perhaps based upon Autumn Rademacher's identification in the photo lineup, that her identification now today is tainted because she's seen a picture of him and picked him out, okay, that, under the circumstances, the prosecution would concede, but beyond that I think is stretching it too far.

THE COURT: I agree, that's where I would draw the line, and I would—because I will be instructing the jury on the other point, the fact that the—that all of this evidence regarding the photo lineup is to be disregarded, it's not to be used, any ID made in it is—is not valid, not to be considered, because we're not able today to put together the group of pictures and so that they could be argued and shown.

MR. TUBBS: Is—is—I don't know if—if this is a possibility, but for us to have a continuance at this point for the defense to get an opportunity to examine the photographs that she may have seen and for us to have that opportunity to do that, and—

THE COURT: Well, you would only need—I imagine a matter of a few minutes if those pictures could be brought over from next door.

MR. TUBBS: If—maybe—maybe we should do that, give the defense an opportunity to take a look at that so that we know what maybe we're dealing with, 'cause to some extent we're in a little bit of a vacuum 'cause I don't know what those photographs are.

THE COURT: Mr. Pappas?

MR. PAPPAS: I have no objection, your Honor.

THE COURT: Okay, first of all, I think I'm gonna call the jury in and tell 'em that we've had a delay, just—or maybe it's sufficient to just ask the bailiff to

just let them know that we've had the—we've had some evidence problems and we'll be calling them out as soon as we can, just something like that.

(Bailiff relays message to jurors)

THE COURT: Okay, let's take a recess and then ask Deputy Wooters to get the pictures over as quickly as we can.

(At 3:50 p.m., court recessed)

(At 4:08 p.m., court reconvened)

THE COURT: Mr. Tubbs, I understand you have now had a chance to look at the other mug shots of the individuals who—whose pictures were shown along with Mr. Esser's.

MR. TUBBS: Your Honor, I have had that opportunity, I've had the opportunity to discuss this with my client in private. I think what the defense will elect to do in light of the Court's ruling on our motion would be to select the option that the instruction would be made to the jury that they are to disregard any testimony that has been offered both through Autumn Rademacher and through Detective Wooters as to any identification that was made in the photographic lineup.

THE COURT: Okay, are we ready to—oh—

MR. TUBBS: I—I just—I just want to make sure then, just so that we don't have a problem later on with what I say or don't say, is that in my closing I may make an argument to the jury that her identification of Mr. Esser may have been tainted by the fact that she had previously seen a photograph of him, that that would be the extent of any remarks I may be allowed to make with respect to the photographic lineup.

THE COURT: That's correct.

MR. PAPPAS: That's fine, your Honor.

MR. TUBBS: I—and just for purposes of the record, again, I would just state that I object, that I think I can

do more than that, but let's cut this short and be on with it.

THE COURT: Okay, I—I think you've made that point, so let's call the jury in and continue.

(At 4:09 p.m., jury returns)

THE COURT: Okay, everybody's here, you may be seated and this is going a little slower than we expected, we had—had some problem and I'll be pointing this out again at the end of the trial, but in turns out that we cannot ascertain today exactly which pictures were shown to Autumn Rademacher by Detective Wooters, from which group he picked out a picture of Mr. Esser, so we determined that the jury is gonna have to completely disregard all testimony, all evidence, having to do with this photographic lineup of pictures. It's—it's, as I say, it's not possible today for us to reconstruct exactly what pictures were shown to her, so it's not possible for you to see whether or not it was a—a fair and reasonable sampling of other pictures of people of the same rough description, so because it's not possible to do that, the—the effect of that identification is that it should be completely thrown out and we're not gonna use it at all. You're not going be seeing any of those pictures and the fact that she did pick out a picture of Mr. Esser has—has no value in the trial from this point forward, and it's —you're not gonna be hearing any more evidence at all about that, so with that, are there—do you have any other questions to the Detective?

MR. PAPPAS: No, your Honor.

* * * *

APPENDIX F

STATE OF MICHIGAN
IN THE 86TH DISTRICT COURT
FOR THE COUNTY OF GRAND TRAVERSE

Case No. 92-4984 SM

PEOPLE OF THE STATE OF MICHIGAN,

v.

DANIEL ALLEN ESSER,
Defendant.

MOTION FOR JUDGMENT OF ACQUITTAL
AND NEW TRIAL

BEFORE THE HONORABLE JAMES R. MCCORMICK,
District Judge

Traverse City, Michigan—Monday, March 29, 1993

* * * *

MR. PAPPAS: Your Honor, just a point of contention, the trial wasn't held until January.

THE COURT: January?

MR. PAPPAS: Yes.

THE COURT: Okay, I was thinking it was late November.

MR. PAPPAS: So it was even a longer time.

THE COURT: Okay, so we're talking from July 30th, I don't know exactly what date she was shown the picture, but I assume it was sometime within a week anyway after that, so we're talking about August, Septem-

ber, October, November, December, sometime in January, we're talking about over five months between the time that the incident happened and she was shown a group of snapshots, and then her next opportunity to see the man, she never saw the picture in between, that's the information that we have. It would not seem to me that—that having looked at, let's say, half a dozen snapshots of different people, she probably looked very carefully at each one and then she said "That's him," that—that that picture, that's assuming that it wasn't him, she picked out a picture of somebody who was—who did not commit the offense, that she would be left with such a strong recollection of the picture—not the man but the picture—that she would walk into court five or six months later and look at somebody and say "That's him," and what she really would be doing without knowing it would be—would be saying "That man looks like the picture I saw." That does psychologically, from my understanding of how people and how I think and remember, that doesn't seem too likely. If you—if you saw a picture of somebody in the newspaper, even though you might look very carefully at them at the time and really be interested in the article, and then five months later that you would—that you would actually remember that face from the picture I think is—is really stretching the point, I just don't think people remember faces from seeing them briefly in a picture several months later, unless it's the Mona Lisa or something like that, so I—I guess that's one point and the various other points were argued here regarding the—the influence of the picture as opposed to the man she saw running down—when she was running down the street controlled her in-court ID. Several factors there that lead me to think that—that her in-court ID was sufficiently reliable, that it should not have been struck from the record and that it could form partially the basis for the conviction.

It's true that she was obviously traumatized by what she saw, and as it's argued in the defense counsel's brief,

she admitted that she was only in the position to really look at him for a matter of several seconds as she jogged by his car. She was close as I remember, like within perhaps ten feet, quite close in any event. She probably would've looked at him in the face first and then she saw what he was doing. I can't imagine that she—that her eyes stayed fixed on the offensive act that he was doing, she probably looked away from that real fast, that would seem normal, probably back to his face. I don't think it to be unreasonable or unrealistic to think that a—a teenage girl jogging by a car, looking to her side and suddenly there's a man sitting in a car masturbating and looking at her, that she would see that face for a long time, even though she only saw him for a short time then. This is the kind of thing people have nightmares over. I think it could very well leave a strong enough impression that six months later she walked in the courtroom and saw him that she would say "That is him unquestionably" that that is very plausible.

All in all, I—I think that the—that that evidence was legitimate, not tainted, not significantly tainted, and it obviously formed a (sic) important piece of evidence in the conviction, and I think that that's as it should be under the law. The jury has spoken and I'm gonna allow the verdict to stand and deny the motion for a new trial.

MR. PAPPAS: Thank you, your Honor.

THE COURT: That's all.

(At 2:07 p.m., proceedings concluded)